BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN RE: [redacted], and WILLIAMSON COUNTY BOARD OF EDUCATION	)	No. 02-55

ORDER

This cause of action arose out of a conflict at the conclusion of an I.E.P. meeting called by the Williamson County School System for a discussion of the educational plan for [redacted].

The minutes indicate that the "purpose of the meeting is stated to be production of items to produce an I.E.P." All went well through seven (7) of eight (8) pages of the minutes from this meeting, but on the eighth (8th) and concluding page, we find:

> "The school made a statement that they believe that all day education can be served to [redacted]. The parent stated that she does not believe that the school can provide this."
>
> "The team was not in agreement. The parent requested mediation and the director agreed to go to due process rather than mediation. The meeting ended."

The parents, and specifically the mother, had been given the role of "math teacher" for her son by the Williamson County School System. The mother was designated by the then existing I.E.P., as the child's math teacher, to be taught at home until 10:25 each morning. This designation was apparently due to an inability of the LEA to provide sufficient personnel to instruct this student and had been in place as far back as April, 2002.

Subsequently, on or about October 12, 2002, the Williamson County School System filed a Due Process Request with the State of Tennessee indicating the issue to be resolved as follows:

> "Least restrictive environment: whether the student should be in the school setting all day, as per the I.E.P., or whether the parent should provide some instruction at home."

In response to the LEA's filing of a Due Process Request, the parents have filed their own proceeding and a Motion to Dismiss the action of the School System based upon a failure of adequate notice.

Each party has been diligent to fully brief their respective positions and they have been extremely persuasive in their arguments.

Upon a review of the entire matter and a consideration of the issues presented, it is the opinion of the Administrative Law Judge that the action proposed to be taken by the Williamson County School System at the September 25, 2002, I.E.P. meeting would involve a change in placement for the student. The meeting began with the goal of obtaining such information as would be necessary "to produce an I.E.P." At the conclusion of a congenial and well-focused meeting, there was, for the first time, a comment by the system that the partial home school placement, with the mother, should be changed to a full-time school participation.

There is no question that home schooling is one of the most restrictive environments. The school's indicated desire to make a change in placement must be based upon some evidence that would support their position. The minutes of the September meeting, as previously stated, make no reference to a change until the concluding remarks. But for the last page of the minutes one would believe that no change from the prior I.E.P. would be the best plan for [redacted]. These minutes are totally void of any new analysis, projected curriculum, anticipated goals, or other factors relevant to the system's proposed change from the prior I.E.P. While this Administrative Law Judge does not find

that the meeting was a mere pretextual effort, the manner in which the LEA proceeded with the filing for due process prior to the development of a new I.E.P. based upon sound analysis with specific objectives pursuant to a change in placement is at least suspect.

At the conclusion of the September I.E.P. meeting, there was no consensus as to the action to be taken by the Williamson County School System and there is no evidence to support an opportunity for these parents to either accept or reject a plan promoted by the school system.

Prior to making a change in placement, the school system is required to provide prior written notice to the parents of the child with a disability.

34 CFR 300.503(a)

This notice must be given to the parents prior to the change of placement. Here, the parents met in good faith to consider information for the development of an I.E.P. and the meeting concluded with a cursory statement that the school system is now ready to assume the duties of instruction in math. This Administrative Law Judge is concerned that the school system dismissed its' prior

responsibility to employ adequate staff to instruct this child with a disability in the first instance.

Prior written notice required by 20 USC 1415(c) was ignored by the school system in this case in that the system did not provide written notice of:

1. A meaningful explanation of way the school system suddenly believed that this change in placement was necessary to provide [redacted] with a free appropriate public education;

2. A description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed action;

3. A well-stated and meaningful statement of the factors upon which the system was basing its decision;

4. A statement, to the parents, of the procedural safeguards available to them in the face of a proposed change in placement. Here, the system provided its' notice by way of filing a request for a Due Process Hearing. Had the system concluded its' I.E.P. and given the parents notice of the reasoning behind their

> desire for this change in placement, it is possible that the parents would have gone along with the change rather than be required to defend the filing of a due process request.

School systems certainly have the right to make changes in the educational plan and placement of children with disabilities, but they must do so in a manner which is procedurally correct and with a focus on allowing the parents' full participation in the educational process.

> Board of Education of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690(1982)

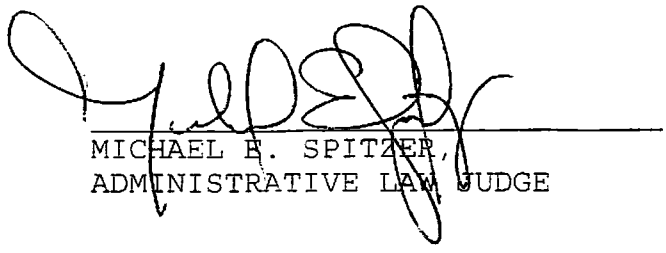
Here, the Williamson County School System failed to provide any prior written notice to the parents of [redacted] even though the system apparently seeks to make a change in placement. Instead of including the parents in the process or, at least, basing their decision on the grounded principles set forth at 20 USC 1415(c), they have initiated a due process request to, in essence, force these parents into the school's position without the opportunity for involvement. Parental involvement is the essence of the notice provisions.

Therefore, it is the decision of this Administrative Law Judge that the Motion to Dismiss filed by the parents of [redacted] is well taken and is granted. Counsel for the parents of [redacted] is entitled to her just and reasonable attorney's fee for that work associated with a response to the system's request for a due process hearing, the motion to dismiss, and reply to supplemental response in opposition to motion to dismiss, as well as the telephone conferences for this case alone. The Administrative Law Judge is aware of a companion case arising out of similar issues, filed by the parents, and believes that the depositions taken to date are necessary in the companion case and, therefore, attorney's fees for the parents' counsel shall not include the taking of these depositions, however, that issue is reserved rather than denied. Counsel for the parents shall submit an affidavit of time and expenses for a determination of the fee to be granted and this affidavit shall specify the time spent on the present case only.

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the district in which the school system is located. Such appeal and review must be sought within sixty (60) days of the date of

the entry of the final order. In appropriate cases, the reviewing court may order that this final order be stayed pending further hearing in this cause.

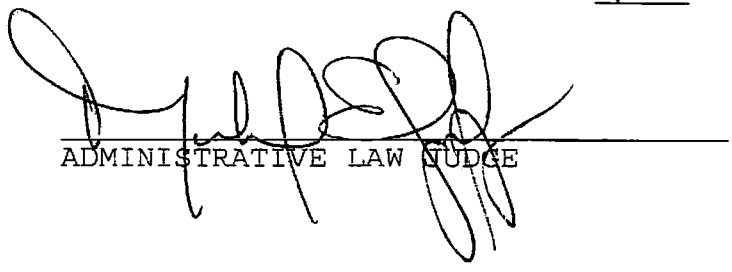
Enter this the 18th day of March, 2003.



MICHAEL E. SPITZER,
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon Mr. John D. Kitch, Kitch & Axford, Suite 305, 2300 Hillsboro Pike, Nashville, TN 37212, and Ms. Suzanne Michelle, Esq., Blackburn & McCune, PLLC, SunTrust Bank Building, 201 Fourth Avenue, North, Suite 1700, Nashville, TN 37209, by enclosing the same in envelopes addressed to them, and by depositing said envelopes in a U.S. Post Office mail box on this the 18th day of March, 2003.



ADMINISTRATIVE LAW JUDGE

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN RE:)
[redacted])
and)
) No. 02-55
WILLIAMSON COUNTY)
BOARD OF EDUCATION)
)

O R D E R

This cause came on for hearing on the motion of the Williamson County Board of EducationSchool System, pursuant to Rule 59.04 of the Tennessee Rules of Civil Procedure to alter or amend the prior judgment. The prior order dismissed the request by the school system for a due process hearing and the petitioner has requested that the court amend that prior order to: (a) set aside that portion of the order which granted a dismissal of the due process request filed by the school system, and (b) delete, in its entirety, any language in the order making reference to the grant of attorney's fees to counsel for the respondent, Gunter Roller, and upon the pleading and statements of counsel, the Administrative Law Judge finds that:

1. The Administrative Law Judge, in considering the motion to dismiss, did, in its discretion, accept,

receive, and review matters outside the request for a due process hearing and the pleadings of the parties and in doing so viewed this motion as one for summary judgment, pursuant to Rule 56, Tennessee Rules of Civil Procedure.

2. Each of the parties was given the opportunity to provide such documents, depositions, and evidence as they deemed appropriate and all evidence filed by the parties, at each stage, including any documents filed with the Rule 59 motions, have been reviewed by this Administrative Law Judge.

3. The factual allegations of the request for a due process hearing concerning issues of "Least Restrictive Environment: whether the student should be in the school setting all day, as per the IEP, or whether the parent should provide some instruction at home" have been taken as true and all reasonable inferences have been made in favor of the Williamson County School System. (copy of the request is attached hereto as Exhibit A)

4. The parent did receive notice of a meeting wherein those present would discuss "whether to begin/change

special education and related services (IEP), and this notice was received and signed by the parent on September 23, 2002. (copy of the notice is attached hereto as Exhibit B)

5. The IEP meeting was, in fact, held and the educational program of [redacted] was discussed between the parties, however, the meeting was never concluded and the prior IEP dating back to April of 2002 was not changed.

6. The prior IEP provided that [redacted] would receive math instruction at his home by his mother until after 10:00 a.m. each day and then he would be in the school setting for the remainder of the day.

7. Other than the failed attempt to make an alteration in the April 2002 IEP, there is no proof that a new IEP for [redacted] has been recommended and agreed upon by school personnel.

Upon these findings, it is hereby ORDERED that:

a. The Administrative Law Judge did not have authority to grant attorney's fees nor does he, here, make any

determination as to the prevailing party to this action, and, therefore, the prior order signed on the 18th day of March, 2003, is amended to delete the following language at page 7:

> "Counsel for the parents of [redacted] is entitled to her just and reasonable attorney's fees for the work associated with a response to the system's request for a due process hearing, the motion to dismiss, and the reply to supplemental response in opposition to dismiss, as well as the telephone conferences for this case alone. The Administrative Law Judge is aware of a companion case arising out of similar issues, filed by the parents, and believes that the depositions taken to date are necessary in the companion case and, therefore, attorney's fees for the parents' counsel shall not include the taking of these depositions, however, that issue is reserved rather than denied. Counsel for the parents shall submit an affidavit of time and expenses for a determination of the fee to be granted and this affidavit shall specify the time spent on the parent case only."

b. The Individuals with Disabilities in Education Act protects children with disabilities and seeks to assure that such children have available to them "a free appropriate education which emphasizes special education and related services designed to meet their unique needs."

20 U.S.C. 1400(c)

Procedural safeguards provide that either the parent of a child with a disability or a public agency may initiate a due process hearing.

20 U.S.C. 1415

c. The Williamson County School System filed its' request for a due process hearing on the grounds of "least restrictive environment" and indicated that the question was whether or not the child, [redacted], should "be in the school setting all day, as per the IEP, or whether the parent should provide some instruction at home." Upon a review of all documents filed with and subsequent to the initial grant of a dismissal in this case, this Administrative Law Judge found that the parent did not have adequate notice of a placement change, prior to the system's filing of a due process request and, therefore, the petition should be dismissed. This opinion has not changed. In filing the request for Rule 59 relief, however, the Williamson County School System presented an alternative issue by advancing the proposition that this was not, in fact, a change in placement and, therefore, no notice was required. The request filed by the school system intrigues this Administrative Law Judge in that it states the issue as being "whether the student should be in the school setting all day, as per the IEP... As previously stated, the child, [redacted], was working under an IEP which provided that the student would be taught at home, by his mother, and not in a school setting all day "as per the IEP." There has been no evidence presented by either side that a new,

altered, changed, or amended IEP was ever developed which provided for [redacted] to be in a school setting all day rather than with his mother part of the day as provided in the existing IEP. The school system may bring a request for a due process hearing if there is a viable basis and this Administrative Law Judge has unsuccessfully, but diligently, sought that basis:

i. If the school system deems that they are seeking a change in placement for [redacted], this Administrative Law Judge cannot find proper written notice and, therefore, their petition must be dismissed, and

ii. If the system deems this a site change and no notice is necessary, this Administrative Law Judge cannot find the IEP which, as alleged by the school system in its' request for a due process hearing, provides for the student to be "in the school setting all day" and, therefore, the school system has no grounds to initiate a due process hearing and their petition must be dismissed.

THEREFORE, the Rule 59 petition filed by the Williamson County School System is granted only as to that part of the

prior order concerning attorney's fees and is overruled as to all other matters and the petition for due process filed by the Williamson County School System, in this cause is dismissed.

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the district in which the school system is located. Such appeal and review must be sought within sixty (60) days of the date of the entry of the final order. In appropriate cases, the reviewing court may order that this final order be stayed pending further hearing in this cause.

Enter this the 8th day of April, 2003.

MICHAEL E. SPITZER,
ADMINISTRATIVE LAW JUDGE